violation of a right of way ordinance is negligence *per se*.[20] Other jurisdictions say that such ordinances impose upon the pedestrian a duty to exercise greater care, or give rise to an obligation of continuous observation, but these courts insist that the driver is not relieved of his duty to exercise due care for the safety of the offending pedestrian.[21] To hold otherwise is to negative a clear intent that the ordinance "shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of pedestrians," and to leave the pedestrian who has inadvertently invaded the vehicular right of way, without remedy against the driver who negligently injures him, unless proximate cause be submitted to the jury and resolved in his favor. R. M. A.

UNINCORPORATED ASSOCIATIONS

Unincorporated Associations — Suability of Labor Unions

In an action against an international unincorporated association of railroad engineers by one of its members for damages resulting from a claimed dereliction of duty of certain officers of the union, the court in a *dictum* said that the association is suable if a proper foundation is laid, basing its statement on the cases following *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A.L.R. 762 (1922) and on Ohio G.C. sec. 11257. *McClees* v. *Grand International Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 12 Ohio Op. 111, 18 N.E. (2d) 812 (1938).

The decision turned on another point, but the court's statement raises the important question of the suability of voluntary associations in general and unincorporated labor unions in particular. It is well settled at common law that a voluntary association is not a legal entity distinct from that of its members. Thus, at common law, an unincorporated labor union could not sue or be sued in its association name, but every member of the labor union had to be made a party to the action.[1]

[20] *Koeppel* v. *Daluiso*, 118 Cal. App. 442, 5 P. (2d) 457 (1931).

[21] *Ivy* v. *Marx*, 205 Ala. 60, 87 So. 813, 14 A.L.R. 1173 (1920): "the ordinance was certainly passed with a view to protect human life, and to give the ordinance a construction which would sanction a relaxation of vigilance on the part of drivers of automobiles upon the public streets would run counter to its evident intent." *Rhimer* v. *Davis*, 126 Wash. 470, 218 Pac. 193 (1920); *W. B. Bassett & Co.* v. *Ward*, 146 Va. 654, 132 S.E. 700 (1926); *Webb-Pepploe* v. *Cooper*, 159 Md. 426, 151 Atl. 235 (1930); *Saunders* v. *Yellow Cab Co.*, 182 Minn. 62, 233 N.W. 599 (1930).

[1] *Cahill* v. *Plumbers, Gas and Steam Fitters' and Helpers' Local 93*, 238 Ill. App. 123 (1925); *Varnado* v. *Whitney*, 166 Miss. 663, 147 So. 479 (1933); Warren, Corporate Advantages Without Incorporation, (1929) pp. 667-8; Note (1938) 26 Georgetown L. J. 999, 1000-2; Note (1937) 21 Minn. L. Rev. 203; 27 A.L.R. 786 (1922); 1 Brit. Rul. Case 852.

In the absence of applicable statutes to the contrary, this is the general rule today.[2]

However, the difficulty of designating an unincorporated association as a party litigant in its common name is deemed to be only a formal procedural defect by most of the authorities. If the objection of non-suability of the group as a legal unit is not raised, it is deemed to be waived.[3] But it is difficult for the pleader to know upon what specific ground to object, because there is a remarkable lack of uniformity as to the precise nature of the defect.[4] And the courts have held that either an association doing business as a legal entity, or one dealing with it as such, may be estopped to deny the existence of the association.[5]

In equity, the difficulties involved in securing jurisdiction over an unincorporated association were greatly alleviated by the development of representative suits. By this technique, an action may be instituted by or against a voluntary association where the members comprising the same are numerous simply by joining as parties to the suit some natural persons, members of the organization, sufficient to represent and protect the interests of the entire membership.[6] But it is no more permissible

[2] *Baskins* v. *United Mine Workers of America*, 150 Ark. 398, 234 S.W. 464 (1921); *Wilson* v. *Airline Coal Co.*, 215 Iowa 855, 246 N.W. 753 (1933); *Ruggles* v. *International Ass'n., etc., Iron Workers*, 331 Mo. 20, 52 S.W. (2d) 860 (1932); *O'Jay Spread Co.* v. *Hicks*, 185 Ga. 507, 195 S.E. 564 (1938); Sturgis, *Unincorporated Associations As Parties to Actions* (1924) 33 Yale L.J. 383; Note (1938) 38 Col. L. Rev. 454; Note (1938) 4 U. Pitts. L. Rev. 233; 27 A.L.R. 786 (1922); 2 L.R.A. (N.S.) 788(1905).

It is submitted that the conclusion reached in Note (1937) 3 O.S.L.J. 237, 241, that "The weight of authority in those states in which there is no relevant statute seems to consider a labor union to be a proper subject of suit" is erroneous. *Michaels* v. *Hillman*, 112 Misc. 395, 183 N.Y.S. 195 (1920) and *Clarkson V. Laiblan*, 202 Mo. App. 682, 216 S.W. 1029 (1919) are cited to support this conclusion. In New York at the time that *Michaels* v. *Hillman* was decided, there was a relevant statute. *Schouten* v. *Alpine*, 215 N.Y. 225, 109 N.E. 244 (1915). The action in *Clarkson* v. *Laiblan* was against the officers and members of the union rather than against the union itself.

[3] *United Mine Workers of America* v. *Cromer*, 159 Ky. 605, 167 S.W. 891 (1914); *Jardine* v. *Superior Court in and for Los Angeles County*, 213 Cal. 301, 307-8; 2 Pac. (2d) 756, 759, 79 A.L.R. 291 (1931); *Franklin Union No. 4* v. *The People*, 220 Ill. 355, 364, 77 N.E. 176, 179, 110 Am. St. Rep. 248, 4 L.R.A. (N.S.) 1001 (1906); *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 91 C.C.A. 631, 166 Fed. 45, 20 L.R.A. (N.S.) 315 (1908); *Operative Plasterers' and Cement Finishers' International Ass'n.* v. *Case*, 93 Fed. (2d) 56 (1937); STURGES, *op. cit.*, pp. 388-9; WARREN, *op. cit.*, pp. 663-4; 27 A.L.R. 786, 790 (1922).

[4] STURGES, *op. cit.*, p. 389.

[5] *Clark* v. *Grand Lodge of Brotherhood of Railroad Trainmen*, 328 Mo. 1084, 43 S.E. (2d) 404, 88 A.L.R. 150 (1931); *Petty* v. *Brunswick and W. Ry. Co.*, 109 Ga. 666, 35 S.E. 82 (1900).

[6] *Newark International Baseball Club* v. *Theatrical M., A. and T. Union*, 125 N. J. Eq. 575, 7 Atl. (2d) 170 (1939); *Aalco Laundry & C. Co.* v. *Laundry Linen, etc., Union Local No. 366*, 115 S.W. (2d) 89 (Mo. 1938); *Carpenters' Union* v. *Citizens' Committee*, 333 Ill. 225, 164 N.E. 393, 63 A.L.R. 157 (1928); WARREN, *op. cit.*, pp. 42-43, 668-9; Note (1938) 38 Col. L. Rev. 454; 1 Brit. Rul. Case. 852, 854.

in equity than at law to bring a suit against an unincorporated labor union *as a legal unit.*[7]

In the federal courts it has been well established that a labor union has a personality capable of being sued ever since the leading case *United Mine Workers of America* v. *Coronado Coal Co., supra.*[8] In an opinion by Chief Justice Taft, the court took cognizance of the fact that the growth and necessities of great labor organizations have brought affirmative legal recognition of their existence and usefulness and held that a national unincorporated labor union and its district and local branches, having been recognized as distinct entities by numerous acts of Congress, as well as by the laws and decisions of many states, are suable as such in the federal courts upon process served on their principal officers. Professor Warren, however, does not think that the court declined to follow the common law rule. Nor does he think that there is anything in the opinion which justifies the conclusion that, if there had been no sec. 8 of the Sherman Act or other pertinent statutes, the court would nevertheless have sanctioned a suit against the unincorporated labor unions upon objection properly taken as to their status.[9] The rule enunciated in the *Coronado Coal Co.* case has its limitations, however, in that the federal courts have refused to endow unincorporated labor unions with the attributes of citizenship apart and separate from its members for making out diversity of citizenship. The actual citizenship of its members determines the citizenship of an unincorporated labor union for purposes of federal jurisdiction.[10]

Let us now examine the law on unincorporated associations in Ohio. The statute most directly applicable in Ohio is G.C. sec. 11257. It provides: "When the question is one of a common or general interest of many persons, or the parties are very numerous, and is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The statute is an enactment of the equitable principle of virtual

[7] Equity differs from the common law only in that it may be sufficient to have before the court only *some* of those who would have been necessary parties if the proceeding had been at law. *Pickett* v. *Walsh,* 192 Mass. 572, 589, 78 N.E. 753, 760, 6 L.R.A. (N.S.) 1067, 1081, 7 Ann. Cas. 638, 645, 116 Am. St. Rep. 272 (1906); WARREN, *op. cit.,* p. 669.

[8] Subsequent federal cases accepting and following the *Coronado Coal Co.* case: *Christian* v. *International Ass'ns of Machinists,* 7 Fed. (2d) 481 (1925); *Dean* v. *International Longshoremen's Ass'n.,* 17 Fed. Supp. 748 (1936). See Note (1937) 12 Wis. L. Rev. 523.

[9] WARREN, *op. cit,* pp. 661-4. But see Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 Harv. L. Rev. 977, 1003.

[10] *Russell* v. *Central Labor Union,* 1 Fed. (2d) 412 (1924); *Gaunt* v. *Lloyds America of San Antonio,* 11 Fed. Supp. 787 (1935); *Rosendale* v. *Phillips,* 87 Fed. (2d) 454 (1937); *Ex parte Edelstein,* 30 Fed. (2d) 636 (1929) noted in (1929) 42 Harv. L. Rev. 1079; Note (1933) 33 Col. L. Rev. 363.

representation. The question then arises as to whether the statute is merely confirmatory and only applicable to suits equitable in nature or whether it was intended to apply to actions at law as well. Professor Warren in his book[11] lists 26 states besides Ohio which have a statute similar to G.C. sec. 11257. In some states the statute would seem to be merely confirmatory. For example, in Georgia the statute is contained in a chapter entitled "Parties to Equitable Proceedings."[12] However, in *Platt* v. *Colvin*, 50 Ohio St. 703, 36 N.E. 735 (1893), to the argument that the statute was restricted to equitable proceedings, the court said (pp. 711-12): "One object of the code in abolishing the distinction between actions at law and suits in equity, and prescribing the same method of procedure for the prosecution of both, evidently was to simplify judicial proceedings, and facilitate the administration of justice; and to accomplish that end, its provisions, and proceedings under them, should receive the liberal construction which it expressly required shall be given them. To restrain the application of section 5008 (now G.C. sec. 11257), to actions of a purely equitable nature, would, we think, be at variance with its language, and the general spirit and purposes of the code." The court, therefore, held that the statute applied to actions of a legal, as well as to those of an equitable, nature. It is Professor Warren's opinion that in the majority of the states in which such a statute has been passed it was the legislative intent that the statute should apply at law as well as in equity.[13]

It has been uniformly held by the courts in Ohio that an unincorporated labor union falls within the provisions of G.C. sec. 11257. However, most of the cases involving it have arisen in litigation that would have been within the jurisdiction of the equity court prior to the Code, such as injunction cases[14] and receiverships.[15] The cases in which the statute has been invoked to enable an unincorporated association to sue or be sued in actions involving purely legal questions are few. It has been held that an unincorporated association can take advantage of the statute to sue for damages in tort actions[16] and actions for breach of contract.[17] It seems to be well settled that a member of an unincorporated association can not sue it for damages suffered by him as a

[11] WARREN, *op. cit.*, p. 543.
[12] Georgia, Code, 1932, sec. 5415.
[13] WARREN, op. cit., p. 544.
[14] *Hillenbrand* v. *Building Trades Council*, 14 Ohio Dec. (N.P.) 628, Hosea, 327 (1904); *Statler Co.* v. *Employees' Alliance*, 19 Ohio N.P. (N.S.) 375, 27 Ohio Dec. (N.P.) 178 (1914); *Leverant* v. *Cleveland Home Brewing Co.*, 24 Ohio N.P. (N.S.) 193 (1922).
[15] *Kealey* v. *Faulkner*, 7 Ohio N.P. (N.S.) 49, 18 Ohio Dec. (N.S.) 498 (1907).
[16] *Platt* v. *Colvin*, 50 Ohio St. 703, 36 N.E. 735 (1893).
[17] *Kinney* v. *Pocock*, 8 Ohio N.P. (N.S.) 121, 19 Ohio Dec. 354 (1908).

member.[18] But there seems to be a scarcity of clear authority either way in Ohio on the question whether an unincorporated association can be sued by a non-member in a tort action for damages caused by members of the association.[19] The only reported case directly applicable seems to be *Kiser* v. *Motion Picture Operators' Union*, 4 Ohio L. Abs. 55 (1925). This case has a very interesting history. In the first report of the case (24 Ohio L. Rep. 144, 3 Ohio L. Abs. 594), both 24 Ohio L. Rep. 144 and 3 Ohio L. Abs. 594 have in their headnotes that a member of a local branch of a national labor union, who is denied employment in violation of its constitution by the officers of the local branch although they had opportunity to provide employment, has an action for damages against the officers and local branch. However, the reported opinion in 24 Ohio L. Rep. 144 said, "The principal question then is, assuming the facts of the petition to be true, may the plaintiff claim damages in an action at law against the *officers* of the local labor union" (italics added). The opinion then quotes extensively from *Local Union No. 65 of The Amalgamated Sheet Metal Workers' International Alliance* v. *Nalty*, 7 Fed. (2d) 100 (1925). This case is authority for the rule given in the headnotes, but as it has been pointed out, the rule in the federal courts is different from the general rule. As reported in 4 Ohio L. Abs. 55, a motion was made to quash the action on the plea that the local was an unincorporated association and not a legal entity and therefor could not be sued. In an abstracted opinion the court held that an unincorporated labor union can be sued as such and service may be had upon it through its officers, citing *Hillenbrand* v. *Building Trades Council*, 14 Ohio Dec. (N.P.) 628, Hosea, 327 (1904) as authority. In an appeal to the Court of Appeals for Hamilton County, the court discussed plaintiff's demurrer to one of the defenses of defendant on the ground that it did not state a defense to the action, said that such a demurrer searches the record, and held that

[18] This was the holding in the principal case. *McClees* v. *Grand International Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 12 Ohio Op. 111, 18 N.E. (2d) 812 (1938). See also *Koogler* v. *Koogler*, 127 Ohio St. 57, 186 N.E. 725 (1933); *McCann* v. *Local Union No. 476, Brotherhood of Painters, Decorators and Paperhangers of America*, 28 Ohio L. Abs. 385 (1938).

[19] It is submitted that the concusion in Note (1937) 3 O.S.L.J. 237, 242 that "it would appear in this state (Ohio) the employer could maintain an action for damages against the labor union instigating a sit-down strike" is based on doubtful authority. *Parker* v. *Bricklayers' Union No. 1*, 10 Ohio Dec. Rep. 458, 21 Wkly. L. Bull. 223 (1889) and *Kiser* v. *Motion Picture Operators' Union*, 24 Ohio L. Rep. 144, 3 Ohio L. Abs. 594 (1925) on second hearing 4 Ohio L. Abs. 55 (1925) are cited to support this conclusion. In *Moores and Co.* v. *Bricklayers' Union No. 1*, 10 Ohio Dec. Rep. 665, 675, 23 Wkly. L. Bull. 48, 54 (1890) which arose out of the same cause of action and involved the same defendant as in *Parker* v. *Bricklayers Union No. 1*, *supra*, it was indicated that the Bricklayers' Union No. 1 was a corporation. *Kiser* v. *Motion Picture Operators' Union*, *supra*, is discussed in the body of this note.

plaintiff's petition charging conspiracy to deprive plaintiff of advantages of membership in the union without alleging facts or acts of conspiracy does not state a cause of action. There was no discussion on the suability of an unincorporated labor union for damages. 26 Ohio App. 284, 6 Ohio L. Abs. 4, 159 N.E. 494 (1927).

Hillenbrand v. *Building Trades Council, supra,* is a case frequently quoted. Although it was a suit for an injunction, the court delivered a rather extensive opinion on the suability of unincorporated labor unions. The court held that an injunction would lie against an unincorporated labor union, in its own name, when sued together with one or more of its members individually, upon whom service might be had in their representative capacity, and that such an injunction would be binding upon the body as an entity, and against all the members, whether or not they were directly represented.

However, the same court that decided *Hillenbrand* v. *Building Trades Council, supra,* in a later case involving an injunction had this to say about that case:[20] "We regret to say that we find ourselves differing from the learned judge who decided that case, not so much as to the law which is therein expressed, as with the practical results which must necessarily follow the rule which he adopted. An action for an injunction is a proceeding *in personam,* and we do not believe that the court has the moral right to lay its restraining hand upon one who may never have heard of the controversy which is before the court, who may never have participated in the acts which are the object of its animadversion, and who has had no opportunity to defend himself against the imputation which would thus be made to rest upon him. . . . Of course, these men and women who are aware of the injunction will necessarily be controlled thereby, and they will not violate the writ except at their peril, but the injunction will actually issue only as to those who are made parties."

Serious difficulties would arise if an attempt were made to apply a statute like Ohio G.C. sec. 11257, without the aid of other statutes, when an unincorporated association is sued for damages. The very words of the statute indicate that it contemplates a representative suit rather than an action binding a group as a unit. Ordinarily, a judgment for the plaintiff in an action at law establishes a personal liability for the entire amount of the verdict against every defendant. It would naturally follow that if service on the members of a group in a representative action were treated as bringing all the individual members before the court, the judgment would determine the personal liability

[20] *Fulworth Garment Co.* v. *Workers Union,* 27 Ohio Dec. 675, 687, 15 Ohio N.P. (N.S.) 353, 365 (1913).

of all. Yet legislative attempts to provide for such judgments have been invalidated as violating the due process clause.[21]

Moreover, it has been uniformly held under Ohio G.C. sec. 11257 that, in order for one to maintain a suit for the benefit of himself and others, there must be community of interest as well as a right of recovery by reason of the same essential facts.[22] Applying this rule in its converse form, some serious difficulties would arise with regard to community of interest as to those members who sanctioned the association's activity that resulted in its liability, those who did not participate either way, and those who openly disapproved of the union's activity. Also, since most of the members were not parties to the action while judgment was being rendered against them, such a result would seem manifestly unfair. In this case Ohio G.C. sec. 11256 could probably be invoked. This statute provides: "Parties who are united in interest must be joined, as plaintiffs or defendants." The situation could be compared to that in *Umstead* v. *Buskirk*, 17 Ohio St. 113 (1866) where a judgment creditor of an insolvent corporation sought to hold several stockholders for their statutory liability. The court said (p. 118): "The liability of the stockholders is several in nature, . . . and the stockholders, whose liability is sought to be enforced, have the right to insist on their co-stockholders being made parties for the purpose of a general account, and to enforce from them contribution in proportion to their shares of stock."

It could even be argued that a judgment for damages against an unincorporated labor union on the sole basis of Ohio G.C. sec. 11257 could not be enforced against the union's treasury.[22a] The treasury funds belong to the members of the union as a group while the statute affects the members of the union as individuals. The members of the union who could not be held personally liable on the judgment could object to their interest in the union's funds being subject to the judgment. Ohio G.C. sec. 11260 would not apply, because it is expressly restricted to partnerships.

The decisions in other states where the question has arisen are by no means uniform. In *Tucker* v. *Eatough*, 186 N. C. 505, 120 S.E. 57 (1923) noted in (1932) 10 N.C.L. Rev. 313, it was held that a statute similar to Ohio G.C. sec. 11257 would merely permit repre-

[21] *D'Arcy* v. *Ketchum*, 52 U.S. 165, 13 L. Ed. 648 (1851). See also *Hall* v. *Lanning*, 91 U. S. 160, 23 L. Ed. 271 (1875); *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. Ed. 517, 15 S.Ct. 559 (1895); Dodd, *op. cit.*, pp. 999-1000. But see *Elliott* v *Greer Presbyterian Church*, 181 S. C. 84, 186 S.E. 651 (1936).

[22] *Stevens* v. *Cincinnati Times-Star Co.*, 72 Ohio St. 112, 154, 73 N.E. 1058, 106 Am. St. Rep. 586 (1905); *Polatsek* v. *Union Trust Co.*, 21 Ohio L. Abs. 294 (1936).

[22a] See editorial (1898) 40 Wkly. L. Bull. 245.

sentative suits by and against unincorporated associations at the option of the association.[23] However, in *Branson* v. *Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354 (1908) seemingly on the sole basis of a statute similar to Ohio G.C. sec. 11257 the court held that an unincorporated labor union could be sued for damages by a non-member and that the funds of the union were subject to execution on the judgment. The court said (p. 288), "While a voluntary unincorporated association cannot by its name alone sue or be sued, nevertheless, such an organization has its rights and responsibilities, which rights it may enforce by appropriate procedure; and, by the same procedure, it necessarily follows, it may be held accountable for its responsibilities. These organizations usually comprise a large membership, and are governed in accordance with prescribed rules and regulations by officers elected for the purpose. They frequently not only possess a large amount of property, but exercise vast powers in the communities in which they exist. It is conceded that they may sue or be sued by joining all their members, but this, if requisite, would impose great inconvenience upon the organizations themselves, as well as hardship upon those seeking redress against such organizations, for it would be impossible, in many instances, for non-members to obtain the names of more than a small fraction of the membership, without great effort, delay, and probable expense. . . . To hold that the defendant organizations (unincorporated labor unions) cannot be sued without including all members, which are so numerous, scattered and difficult to ascertain might cause such hardship and delay as would amount to a denial of justice."[24] It seems then that the court in *Branson* v. *Industrial Workers of the World, supra*, made an entity out of an unincorporated labor union at least for procedural purposes.

Let us now examine the other applicable statutes in Ohio to determine whether the same line of reasoning used in the *Coronado Coal Co.* case, *supra*, can be applied in Ohio. As early as 1904 *Hillenbrand* v. *Building Trades Council, supra*, used the following language (p. 649) "Labor unions have been recognized by law in Ohio as entities capable of exercising the rights of individuals, as in the trade union acts of Great Britain. Thus, by Sec. 4364-49 Rev. Stat. (now G.C. sec. 13102) they are authorized to adopt and possess a trade-mark label in the union name, which name may be registered as such with the secretary of state. (Section 4364-51 [now G.C. sec. 6219]). They may sue to

[23] See *Operative Plasterers' and Cement Finishers' International Ass'n* v. *Case*, 93 Fed. (2d) 56, 59 (1937) for a discussion on this case.

[24] This case is followed by *St. Germain* v. *Bakery and Confectionary Workers Union, No. 9*, 97 Wash. 282, 166 Pac. 665 (1917), which in turn is followed by *Labonite* v. *Cannery Workers' and Farm Laborers' Union*, 197 Wash. 543, 86 Pac. (2d) 189 (1938).

enjoin the unauthorized use of such labels. (Section 4364-53 [now G.C. sec. 6223]); or to recover the penalty (Sec. 4364-53a [sic][25] [now G.C. sec. 6226]; and, where unincorporated, may, by special statute, sue by an officer or member for the benefit of all (Sec. 4364-53a Rev. State. [now G.C. sec. 6225], which recognizes the application of the equity rule. Indeed the legislature has attempted to make it unlawful to prevent men from joining labor unions or to discharge from employment because of such membership. Section 4364-68 Rev. Stat. (later G.C. sec. 12943 which was repealed in 1929.[26])."

The above quotation sounds remarkably similar to the language used in the *Coronado Coal Co.* case, *supra*, and in fact *Hillenbrand* v. *Building Trades Council, supra*, is quoted in the *Coronado Coal Co.* case.[27] Other statutes in Ohio provide for penalties for the fraudulent filing[28] and the unauthorized use[29] of a labor union label or trade-mark. Another statute penalizes the unauthorized wearing of a badge or button of a labor union.[30] Thus it is apparent that the existence of labor unions has been given affirmative legal recognition by several statutes in Ohio. It would seem possible, then, to use the same line of reasoning in Ohio as was used in the *Coronado Coal Co.* case, *supra*. That this will probably be the result seems to be indicated by the favorable reception of the federal rule in the Ohio cases.[31] This is undoubtedly the desirable result. There seems to be no sound reason why an unincorporated labor union should not be liable as such for its acts and its funds be subject to execution on such judgment. To the average layman the distinction between a corporation and an unincorporated labor union as suable entities is not apparent. It might be technically true that the property of an

[25] This is probably a misprint. Section 4364-53c seems to be the section to which the court was referring.

[26] This statute was held unconstitutional. *Jackson* v. *Berger*, 92 Ohio St. 130, 110 N.E. 732 (1915); *State* v. *La Monte Bateman*, 7 Ohio N.P. 487, 10 Ohio Dec. 68 (1900); *Coppage* v. *Kansas*, 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. 240, L.R.A. 1915 C, 960 (1914). In 1931 Ohio G.C. sec. 6241-1 was enacted. This section provides: "Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting, or contained in, any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby (a) either party to such contract or agreement undertakes or promises not to join, become, or remain, a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes, remains, a member of any labor organization or of any organization of employers, is hereby declared to be contrary to public policy and wholly void."

[27] 259 U. S. 344, 390.

[28] Ohio G.C. sec. 13153.

[29] Ohio G.C. sec. 13154 and 13155.

[30] Ohio G.C., sec. 13163.

[31] *McClees* v. *Grand International Brotherhood of Locomotive Engineers*, 59 Ohio App. 477, 12 Ohio Op. 111, 18 N.E. (2d) 812 (1938); *Kiser* v. *Motion Picture Operators' Union*, 24 Ohio L. Rep. 144, 3 Ohio L. Abs. 594 (1925).

unincorporated labor union is in the members as individuals and not in the group as an entity, but the title is only a restricted title and carries with it no right to possess the property for other than group purposes.[32] In all fairness, then, it would seem that the property should also be held liable for the union's acts.

In early times the common law rule on suability of unincorporated associations probably worked no serious harm. Associations were small in membership, and their creditors or other plaintiffs had reasonable opportunity to know or ascertain an entire membership. However, in modern times the fact that unincorporated associations such as labor unions frequently possess large and scattered memberships has made it next to impossible for plaintiffs to ascertain, with any degree of certainty, the names of all the constituent individuals who are made necessary defendants by operation of the common law rule. Moreover, when the membership of the labor union runs into the hundreds of thousands, the requirement that each member of the union be made a party would result in enormous cost and inconvenience. It frequently happens when labor unions become large that they possess some funds in their treasury. When this is so, the, ordinary plaintiff suing such unions for damages is more interested in reaching the funds in the union's treasury than acquiring a judgment against the individual members.

One solution of this problem would be the incorporation of labor unions. This question has been vigorously debated for many years,[33] but although many states permit labor unions to incorporate, relatively few unions take advantage of incorporation.[34] When the statute so permits it, the right of the union to incorporate can not be questioned by the incorporation official.[35]

However, incorporation is what the labor unions have been trying to avoid.[36] In fact recent legislation seems to be aimed at making incorporation of labor unions impossible. In Illinois it has been held that the 1937 amendment to its Not-For-Profit Corporation Act precluded labor unions from incorporating.[37] Ohio in 1935 enacted an amendment to the General Corporation Act affecting corporations not for

[32] Dodd, *op. cit.*, p. 993.

[33] Labor unions should incorporate. Brandeis, *The Incorporation of Trade Unions* (1903) 15 Green Bag 11. Incorporation would not remedy evils of labor unions. Wambaugh, *Should Trade Unions Be Incorporated?* (1903) 15 Green Bag 260; Walter, *Incorporation of Labor Unions* (1906) 68 Alb. L.J. 68. See also Latham, *Federal Regulation of Collective Bargaining* (1937) 6 Geo. Wash. L. Rev. 1, 10; Boyd, *The Case for Regulation of Labor Unions in the United States* (1937) 24 Va. L. Rev. 103, 121.

[34] Note (1938) 38 Col. L. Rev. 454, n. 2.

[35] *Hagan* v. *Picard*, 171 Misc. 475, 12 N.Y.S. (2d) 873 (1939).

[36] Roberts, *Labor Unions, Corporations—The Coronado Case* (1923) 5 Ill. L. Quart. 200.

[37] *People* v. *Hughes*, 296 Ill. App. 587, 16 N.E. (2d) 922 (1938).

profit which provides in part:[39] "The secretary of state shall not file any articles of incorporation wherein the name includes the word 'union,' or the words 'labor union,' or like words expressed in a foreign language." Although the purpose for which this statute was intended to be enacted is not entirely clear, it would seem, by implication, to preclude the incorporation of labor unions in Ohio.

Other states have removed the procedural obstacles in the way of suit against unincorporated labor unions by express statute. In a note in (1938) 38 Col. L. Rev. 454, 456 there is a list of 19 states which have statutes to this effect. Under these statutes the common law conception of unincorporated associations has been altered to the extent of permitting a suit in the name of the union, service on union officers and execution against union funds. The action in essence is still one against the individual members; but the union funds can be reached, and the members' individual property is not subject to execution where the action is against the union.[40] The courts have uniformly upheld the validity of such statutes.[41] The Supreme Court of South Carolina even upheld a statute providing that an unincorporated association might be sued without naming the individual members, by service on the agent of the association, and that an individual member's property is liable for satisfaction of the judgment against the association.[42] It is submitted that the statute to the extent that it binds the members not made parties to the suit goes too far.

Although in Ohio it would seem possible to sue an unincorporated labor union for damages under its present statutes, it is submitted that the best solution of this problem would be to enact statutes expressly covering the situation. The statutes of New York[43] are submitted as an example of the type of statutes which would adequately cover the situation. Pertinent parts of these statutes are as follows:

"Section 12. An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An

[39] Ohio G.C. sec. 8623-98.

[40] *Schouten* v. *Alpine*, 215 N. Y. 225, 109 N.E. 244 (1915); *Meinhart* v. *Contresta*, 194 N.Y.S. 593 (1922).

[41] *Jardine* v. *Superior Court in and for Los Angeles County*, 213 Cal. 301, 2 Pac. (2d) 756, 79 A.L.R. 291 (1931) and note; *Grand International Brotherhood of Locomotive Engineers* v. *Green*, 210 Ala. 496, 98 So. 569 (1923); *United States Heater Co.* v. *Iron Moulders' Union*, 129 Mich. 354, 88 N.W. 889 (1902); *Bobe* v. *Lloyds*, 10 Fed. (2d) 730 (1926).

[42] *Elliott* v. *Greer Presbyterian Church*, 181 S. C. 84, 186 S.E. 651 (1936).

[43] N. Y. Gen. Ass'n. Law (Cahill, 1935) c. 20, sections 12 to 17.

action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members.

"Section 13. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. . . .

"Section 15. In such an action, the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property, or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal or real property belonging to the association, or owned, jointly or in common, by all the members thereof.

"Section 17. This article does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section. . . . "

J.J.L.